The late Lord Chief Justice

NORTH

ARGUMENT

In the CASE

Between Sir WILLIAM SOA

SHERIFF of *SUFFOLK*,

And Sir SAM. BARNARDISTO

Adjudged in the COURT of

Exchequer-Chamb

UPON A

WRIT of ERRO

CONTAINING

The *REASONS* of that *JUDGME*

LONDON,

Printed and are to be sold by *Randal Taylor*. 168

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North's Argument, &c.

SIR *Samuel Barnardiſton* brings an Action upon the Caſe in *B. R.* againſt Sir *William Soame*, late Sheriff of *Suffolk*, ſetting forth that a Writ iſſued for the chuſing of a Knight for that County to ſerve in this Parliament inſtead of Sir *Henry North* deceaſed, that at the next County Court the Freeholders proceeded to Election; and although the Plaintiff was duly choſen *per majorem numerum gentium tunc reſident. infra dict. Comitat. quorum tunc quilibet expendere potuit 40 s. libri ten'ti & ultra per annum infra Comitat. illud, ac licet prædictus* Willielmus, *præmiſſa ſatis ſciens, poſtea brevem præd. in Cur. Cancellar. returnavit, ſimul cum quadam Indentura inter ipſum Vicecomitem & prædict. Electores ipſius* Samuelis *de prædicta Electione ipſius* Samuelis *fact. ſecund. Exigentiam brevis prædict. prædictus tamen* Willielmus *ad tunc Vicecomes Officii ſui debitum minime ponderans, ſed machinans & malitioſe intendens ipſum* Samuelem *in hac parte minus rite prægravare, ac eundem* Samuelem *de fiducia, & officio unius Mil. Comitat. prædict. in dict. Parliamento exercend. omnino fruſtrare, & deprivare, Et prædict.* Samuelem *ad diverſas magnas & grandes pecuniarum ſummas expend. cauſare, contra debitum officii ſui præd. falſo, malitioſe, ſcienter & deceptive, ad tunc in ead. Cancellar. apud* Weſtmonaſt. *prædict. retornavit una cum Indentura prædict. quandam aliam Indenturam eidem brevi ſimiliter annex. ſpecificant' illam fore fact. inter prefat.* Willielmum, *&c. ex una parte, & diverſas alias perſonas dict. Comitat. in Indentura illa ſpecificat. & continent, quod dictæ al. perſonæ, ut major pars totius Comitat. prædict. in prædicto pleno Comitat. elegerunt quend.* Lionellum Talmaſh *Bar. alias dict.* Lionell *Dom.* Huntingtowr *in Regno* Scotiæ *in loco prædicti* Henrici North *un. Mil. Com.* Suffolk *prædict. pro Parliamento prædicto adveniend. eidem Parliamento pro Com. il. Ubi revera prædictus* Lionellus *non fuit electus per majorem partem, prout per ult. Indent. falſo ſupponitur, Ratione cujus quidem falſi retorn. de prædicta al. Indent. &c. idem* Samuel. *in Domum inferiorem pro Comitat. hujus. Regni* Angliæ, *&c. aſſemblat. admitti non potuit, quouſque idem* Samuel. *per petitionem ſuam Comitat. dicti Parliamenti pro remedio congruo exhibit.*

& poſt diverſas ingentes denar, ſummas in & circa manifeſtationem & verificationem dictæ Electionis coram dict. Comitat. expendit & diverſos labores in ea parte ſuſtent. poſtea ſcil. &c. per Comitat. in Domum Comitat. prædict. admiſſus fuit & electio ipſius Samuelis *per Comitat. declarat. fuit fore bona, unde detertat. eſt, & damnum habet ad Valenc' 3000 l.*

There is a Verdict given for the Plaintiff, and Damages found to the value of 800 *l.* and Judgment thereupon, and a Writ of Error is brought to reverſe that Judgment.

I have but little time left me to ſay what I have to offer, it being very late, and yet I muſt deſire leave to produce theſe Reaſons I have in maintenance of my Opinion, I will be careful to detain you no longer then will be neceſſary.

And therefore I will not trouble you to State the Caſe again, nor will I ſpeak of any Exceptions that have been made to the Declaration, for I love not the Niceties of the Law, in Caſes where they do prevail; and in this Caſe I have only conſidered the foundations of the Action, which if I had found well eſtabliſhed upon Reaſon, or the Grounds of Law, I would have Examined what has been Objected to the Forms of the Declaration, which muſt have brought great weight to have overturn'd thoſe Proceedings. But as to the point of the Action, upon the moſt ſerious Conſideration I could have of it, and weighing what hath been before now, and alſo at this time ſaid in Support of it, I am of Opinion that the Judgment ought to be reverſed, for that no ſuch Action (as this at Bar) does lye by the Common Law.

Becauſe this is a Cauſe of conſiderable value, great Damages being recovered, becauſe it is a Judgment of great Authority, being upon a Cauſe tried at the King's Bench Bar, and given upon deliberation there, becauſe it is a Caſe of extraordinary nature, and of great import, each Party pretending benefit to the Parliament by it; becauſe it is an Action *primæ impreſſionis*, that never was before adjudged, the report of which will be liſtned after. I have taken pains to collect and ſet down the Reaſons that I muſt go upon in determining this Caſe, That as the Judgment had the Countenance of ſome deliberation in the Court where it was given; ſo the Reverſal being with greater deliberation, may appear grounded upon Reaſons that ought to prevail.

I can ſay with my Brother *Wyndham*, that I love rather to affirm Judgments than to reverſe them; but I can attribute nothing of Authority to the Judgment, though it were given in a Superior Court, and upon deliberation; I muſt judge upon it as

if

if the Case came to be Originally judged by me. The Argument to support a Judgment from the Authority of its self is *Exceptio ejusdem rei cujus petitur dissolutio*, which must not be admitted in Case of Writs of Error. We are instructed to Examine, and Correct the Errors of that Court, and for that purpose we are made Superior to it. We must proceed according to our own Knowledge and Discretion, else we do not perform the Trust reposed in us.

I must needs say this is a Cause that imports it more than any Cause I have known come before us, for it is a Cause *primæ impressionis*, and the Question is, whether by this Judgment, a change of the Common Law be introduced?

It is the principal use of Writs of Error and Appeals to hinder the change of the Law, and therefore Writs of Error in our Law, and Appeals in the Civil Law do carry Judgments and Decrees to be Examined by Superior Courts, until they come to the highest who are intrusted, that they will not change the Law.

Therefore do Writs of Error lie from *Ireland* which is a Subordinate Kingdom to *England*, by whose Laws it is Governed, that they might not be able to change the Law by their Judgments, and not so much for the particular right of the Party. For otherwise it would be very easie for Judges by Construction and Interpretation to change even a Written Law; and it would be most easie for the Judges of the Common Laws of *England*, which are not Written, but Deputed upon Usage, to make a change in them, especially if they may justifie themselves by such a Rule as my Brother lays down to support this Case, *&c.* That the Common Law complies with the Genius of a Nation; but when that Genius changes, the Parliament is only intrusted to judge of it, and by changing the Law, to make it suitable to it. But if Judges will say it is Common Law, because it suits with the Genius of the Nation, they may take upon them to change the whole, as well as any part of it; the Consequence whereof may easily be seen, I wish we had not found it by sad Experience.

If the Case at Bar be a change of the Law, it is happy that it comes to be Questioned in the first Instance, for if this Cause had been any way Agreed or Quitted, and a second Case of this nature had been Questioned, there would have been President urged, which cannot be spoke of it; for this Case hath no fellow, there never having been the like Judgment before.

The Method I ſhall take in what I have to ſay ſhall be,

1. To remove ſome Prejudice the Caſe is under.
2. Give my Reaſons againſt the Action.
3. Weigh what hath been ſaid to maintain the Action.

The Caſe is under this Prejudice that an Action of the Caſe lies for falſe Retorns of Sheriffs, and why ſhould it not lie in this Caſe, as well as any other.

To remove this Prejudice, I ſhall ſhew ſome material difference betwixt the nature of Ordinary Retorns, and this Retorn.

In Ordinary Retorns the Party is concluded, and abſolutely without remedy, for the Court muſt take the Retorn as the Sheriff makes it.

In Ordinary Caſes the Sheriff may and frequently does take Security of the Plaintiff, or the Sheriff hath means by Law to be ſecure; as if he doubts the property of the Goods, he may return a *Fieri facias, Nullus benit ad monſtrandum bona.* In ſome Caſes he may for his Safety Impannel a Jury, as upon an *Elegit*; or he may reſort the Court, and pray a reaſonable time to prepare his Retorn, if the matter be difficult; and hath other ſhelters, that if he be away he may ſave himſelf from Danger.

But in this Caſe the Party is not concluded, for upon a Petition to the Parliament, if they ſee it juſt, they will cauſe the Retorn to be altered by the Clerk of the Crown, if the Sheriff be not in the way; In this Caſe the Sheriff may not take Security, it were Criminal in him to make ſuch a Retorn by Compact: Nor can the Sheriff make a fruitleſs Retorn, or obtain delay to conſult his Safety.

Theſe differences are of that nature, that they change the Caſe in the reaſon of it, as I ſhall hereafter make appear; and no Man can infer, becauſe an Action lies for falſe Retorns in Ordinary Caſes, therefore it lies in a Caſe of a Retorn to Parliament, where the Sheriff is clearly upon other terms.

My Reaſons againſt this Action are all applicable to this Caſe, and make it different from all the Caſes that have been put by my Brothers, that Argued for the Action. I obſerve, that they Argued only upon Generals, without any other application to this Caſe, and then by a Topick of concluding *a Minori ad majus*, becauſe Actions lie in Caſes of inferior nature, therefore it will lie in this; which Rule holds not in divers Caſes, where there are particular

cular Reaſons to the contrary, as I ſhall by and by ſhew to be in this.

My Firſt Reaſon is this, becauſe the Sheriff, as to the declaring the Majority, is a Judge; and no Action will lie againſt a Judge for what he does Judicially, though it ſhould be laid *falſo, malitioſe & ſcienter*, as appears 1 *Co. Rep. fol.* 24. They that are intruſted to judge ought to be free from Vexation, that they may determine without Fear; the Law requires Courage in a Judge, and therefore provides Security for the ſupport of that Courage.

But Firſt, Is the Sheriff a Judge in this Caſe? Secondly, Is there the ſame Reaſon he ſhould be free from all Action?

As to the Firſt, it is of neceſſity, that as to the declaring of the Majority he ſhould be the Judge upon the Place. In other Caſes, in the County Courts, the Freeholders are the Judges, and he is the Miniſter: When we ſay the Freeholders are Judges, we mean the Major part of them is to judge; but when the Queſtion is, which is the Major part, they cannot determine that Queſtion, but of neceſſity the Sheriff muſt determine that; the nature of the thing ſpeaks it.

Therefore it was held rightly in *Letchmere's* Caſe, 13, 14 *Car.* 2. *Hugh's Abr.* That as to the Election of Knights to Parliament, the Court is properly the Sheriffs Court, and the Writ is in the nature of a Special Common (*Elegi facias.*)

I know a Judge may have many Miniſterial Actions incumbent upon him, as the Chief Juſtice have to certifie Records upon Writs of Error; therefore it is neceſſary for me to obſerve, that the Suit is here for what he does as a Judge, and not for any thing Miniſterial, which appears by the Averment, that the Sheriff annexed an other Indenture, ſpecifying to be made by the Major part of the Freeholders, and containing that the Lord *Huntingtowr* was choſen, *Ubi revera*, the Lord *Huntingtowr* was not choſen by the Major part of the Freeholders. If it had been ſaid *Ubi revera*, the Freeholders ſuppoſed to Seal the ſame, never did Seal the ſame, there had been a falſity in the Miniſterial part of ſending in the Indenture: But his ſending Two Indentures which were really Sealed by the Freeholders as they import, wherein the Freeholders of each Indenture (and not the Sheriff) ſay they are the major part, is no falſity in his Miniſterial part, but only deferring to judge between them, which is the Major part, or more properly judging that they are both equal in number.

They

They Object, that the matter in Queſtion is not matter of Judgment, it is but counting the Poll, which requires Arithmetique, but not Judgment. But certainly, if it be righty conſidered, it will be thought that this Queſtion of Majority is not barely a Queſtion of Fact, but a Queſtion of Judgment, a Queſtion of difficult Judgment, there are ſo many Qualifications of Electors. Firſt, They muſt have 40 *s. per Annum*, there the Value muſt be judged. Secondly, It muſt be Freehold, there the Title. Thirdly, It muſt be their Own, there colourable and fraudulent Gifts, made many times on purpoſe to get Voices, muſt be judged. Fourthly, The Electors muſt be Reſident there, the Settlement of the Party muſt be determined. Fifthly, There are many things that incapacitate Voices, as Bribery, Force, *&c.* And many other Queſtions ariſe that are of ſuch difficulty, that in debate of them much time is ſpent in Parliament, and ſometimes a Committee determines one way, and the Houſe another; Is not this a Queſtion that refers to Judgment?

They Object again, that the Sheriff may give an Oath concerning all the Qualifications, and he is to look no further.

I Anſwer, the Statute hath given the Sheriff power to give an Oath in aſſiſtance of him, but the Statute doth not ſay, that whoſoever takes that Oath ſhall have a Voice: Neither does the Stat. 23 *Hen.* 6. ſay, that the Sheriff ſhall not be charged with a falſe Retorn that purſues that way. So that although he may uſe thoſe means for his Direction, yet he muſt conſider his own Safety, not to make a falſe Retorn. If a Man upon taking ſuch Oath give a ſpecial Anſwer, or it ſhould be known to the Sheriff that he ſwears falſe, the Sheriff muſt determine according to his own Judgment, and not by what is ſworn.

It may be hence concluded, that the Sheriff, as to the declaring the Majority, is a Judge; And if ſo, my next Aſſertion is, That there is the ſame Reaſon he ſhould be free from Action as any Judge in *Weſtminſter-hall*, or any other Judge. Does it not import the Publick that the Sheriff ſhould deal Uprightly and Impartially? Ought he not to have Courage, and for that end ſhould not the Laws provide him Security?

Conſider his Diſadvantages; What a Noiſe and Croud accompany ſuch Elections? What Importunity? Nay, what Violence there is upon him from the conteſting Parties.

We may ſay, no other Judge has more need of Courage and Reſolution to manage himſelf, and determine uprightly, than he: No other Judge determines in a Caſe of greater Conſequence

ſequence to the Publick, or Difficulty than he: Expoſe him to ſuch Actions, and in moſt Elections he muſt have trouble; for commonly each Party is confident of his Strength, and his Conduct, and his Friends, that let the Sheriff return never ſo uprightly, the Party that is rejected will revenge it by a Suit, eſpecially if he may Sue at Common Law to have boundleſs Damages, without running any hazard himſelf, but of the loſs of his Coſts.

If we Judges, that find our ſelves ſecure from Actions, ſhould not be tender of others that are in the ſame Circumſtances, it may be well ſaid, *Wo unto you; for you impoſe heavy Burthens upon others, that will not bear the leaſt of them your ſelves.*

My ſecond Reaſon is becauſe it is *alieni fori*, either to examine the right of Election or behaviour of the Sheriff, both which are incident, and indeed the only Conſiderations that can guide in the Tryal of ſuch Cauſes, if they be allowed.

It is admitted that the Parliament is the only proper Judicature to determine the right of Election, and to cenſure the behaviour of the Sheriff; How can the Common Law try a Cauſe that cannot determine of thoſe things, without which the Cauſe cannot be tryed?

No Action upon the Caſe will lye for breach of a Truſt, becauſe the determination of the Principal thing (the Truſt) does not belong to the Common Law, but to the Court of Chancery; certainly the Reaſon of the Caſe at Bar is ſtronger, as the Parliament ought to have more Reverence than the Court of Chancery.

They Object, that it may be tryed after the Parliament hath decided the Election, for then that which the Common Law could not try is determined, and the Parliament cannot give the Party the Coſts he is put unto:

Then I perceive they would have the determination of the Parliament binding to the Sheriff in the Action, which it cannot be, for that it is between other Parties to which the Sheriff is not called: It is againſt the courſe of Law, that any Judgment, Decree, or Proceeding betwixt other Parties, ſhould bind the Intereſt of, or any way conclude a Third Perſon; No more ought it to do here. It may be eaſie for Parties combining to repreſent a Caſe ſo to the Parliament that the Right

of Election may appear either way as the Parties pleaſe; Is is fit that the Sheriff who is not admitted to controvert ſuch Determination ſhould be concluded by it in an Action, brought againſt him to make him pay the Reckoning?

Did the Parliament believe when they determined this Election, that they paſſed Sentence againſt the Sheriff upon which he muſt pay 800 *l.* Sure if they had imagined ſo, they would, nay in Juſtice they ought to have heard his Defence before they determine it.

And yet that was the meaſure of this Caſe, the Sheriff was not heard in Parliament, indeed he was not blamed there, and yet upon the Tryal, which concerned him ſo deeply, he was not allowed to defend himſelf, by ſhewing any Majority or Equality of Voices, the Parliament having determined the Election.

I do not by theſe Reflections tax the Law of injuſtice, or the Courſe of Parliament of inconveniency; I am an Admirer of the Methods of both, it is from the Excellency of them, I conclude this proceeding in this new-fangled Action, being abſurd, unjuſt, and unreaſonable, cannot be Legal.

To anſwer the other Branch of this Objection, I ſay, it does not follow, that becauſe the Parliament cannot give Coſts, therefore this new deviſed Action muſt lye to help the Party to them.

For then ſuch an Action might lye in all Caſes, where there is a Wrong to be remedied by courſe of Law, and no Coſts are given for it.

At the Common Law no Coſts were given in any Caſe, and many Caſes remain at this day, where the Statutes have given no Coſts, as in a Prohibition, *Scire facias*, and *Quare impedit*, and divers other Caſes, and yet no Action will lye to recover thoſe Coſts. And why ſhould it lye in the Caſe at Bar?

In this Caſe the Parliament have already had it under their Conſideration in the Statute 23 *Hen.* 6. and have appointed what ſhall be paid by the Sheriff that offends, *ſc.* 100 *l.* to the King and Impriſonment. The Parliament have ſtated what ſhall be paid for Compenſation, and what for Puniſhment, and would have provided for Coſts if they had thought fit.

My

My third Reaſon is, becauſe a double Retorn is a lawfull Means for the Sheriff to perform his Duty in doubtfull Caſes.

If this be ſo, then all Aggrevations of *falſo, malitioſe, & ſcienter*, will not make the thing Actionable; for whatever a Man may do for his Safety, cannot be the Ground of an Action.

There is ſometimes *Dam' abſque injuria*, though the thing be done on purpoſe to bring a loſs upon another, without any deſign of benefit to himſelf: As if a New houſe be erected contiguous to my Ground, I may build any thing on purpoſe to blind the Lights of the New houſe, and no Action will accrue though the Malice were never ſo great, much leſs will an Action lye, where a Man acts for his own Safety.

If a Jury will find a Special Verdict, If a Judge will adviſe and take time to conſider, If a Biſhop will delay a Patron, and impannel a Jury to Enquire of the Right of Patronage, you cannot bring an Action for theſe Delays, though you ſuppoſe it to be done malitiouſly, and on purpoſe to put you to Charges, though you ſuppoſe it to be done *Scienter*, knowing the Law to be clear; for they take but the Liberty the Law has provided for their Safety, and there can be no demonſtration that they have not real Doubts, for thoſe are within their own Breaſts. It would be very Miſchievous that a Man ſhould not have leave to Doubt without ſo great a Peril.

The courſe of Parliament makes out the ground of this Reaſon to be true in Fact. *ſcil.* That a double Retorn is Lawfull when the Sheriff doubts; for if the Parliament did not allow a double Retorn in doubtfull Caſes they ought never to accept a double Retorn, if it were in it ſelf a void and unlawfull Retorn, they ought not to endure it a moment, but ſend for the Sheriff and compell him forthwith to make a ſingle Retorn; But we ſee that where there is ground of Doubt, the Parliament ſends not for the Sheriff before they have examined the Caſe, and give particular Directions.

And it muſt of neceſſity be the Courſe, for ſuppoſe the Voices are equal, ſuppoſe the Election is void for force, ſuppoſe the Sheriff doubts upon the validity of ſome Voices, ſhall he tranſmit his doubts ſpecially to the Parliament? Was

Was there ever any ſuch thing done? Was there ever any other way but to make a double Retorn, and leave it fairly to the deciſion of the Parliament?

It was ſaid by my Brother, that if the Sheriff had retorned in the nature of a Special Verdict the Special Matter, and had concluded in this manner, *viz*, If the Parliament ſhall adjudge Sir *Samuel Barnardiſton* to be choſen, then he retorns him; and if the Parliament ſhall adjudge the Lord *Huntingtowr* to be choſen, then he retorns him, that ſuch a retorn as this had been ſafe, and could not have born an Action.

This is a pretty Invention found out for Arguments ſake, but methinks it furniſhes no force at all to the part for which it is brought, but rather ſhews the right to be the other way; for let any Man of Reaſon ſay, whether a double Retorn be not the ſame thing in Conſequence, Is not a double Retorn as if the Sheriff ſhould ſay to the Parliament (the right of Election is between theſe two, I am in doubt which of them I ſhall reject, and expect your Directions.) This is the import of a double Retorn, and is the ſame in effect, as if it had concluded like a Special Verdict, and ſo by my Brother's inſtance the Caſe ſhould not be Actionable, though he concluded otherwiſe.

That other new-fangled way could not be received; for, Firſt, The Freeholders would never joyn in ſuch a Retorn. Secondly, Such a Retorn is not capable of being mended by the Sheriff, But the Judgment of the Parliament muſt be entered upon Record to make it any Retorn, it concluding nothing of it ſelf, as a Verdict concludes nothing till the Judgment of the Court be entered upon the Roll with it. Thirdly, The Parliament will not, as I believe, admit of new Deviſes in the Courſe of their Proceedings, whatſoever we do at Law.

But the double Retorn is practicable in the Country; for the Freeholders of each part will tender their Indentures. Secondly, It is eaſily amended in Parliament, by rejecting the Indenture of thoſe Freeholdres that were not the Major part.

Thirdly,

Thirdly, The way has been practiſed in doubtfull Caſes for many years. So that I apprehend the Caſe at Bar to be more regular and favourable than the Caſe my Brother put, as a Caſe that would not bear an Action.

Again, ſuppoſe the Sheriff had informed the Parliament of his Doubts, and that he could not readily determine where the Majority was, but it was betwixt two Perſons, *A.* and *B.* and thereupon deſired their favour either to grant him time to determine it, if they pleaſed to command him ſo to do, or elſe that they would decide it themſelves, and he would obey what Directions they ſhould make in it, and thereupon the Parliament had taken upon themſelves to determine it.

This moſt clearly had not been Actionable, for it was not Actionable to delay a Retorn to any Court of Juſtice, where the Sheriff hath leave from the Court ſo to do.

A double Retorn, in my Underſtanding, ſpeaks the ſame thing to the Parliament, and upon it they may either direct the Sheriff to make a ſingle Retorn, which is to cauſe him to decide it, or they may do it themſelves.

And here I muſt needs reflect upon the ſecond Reaſon I gave againſt the Action, that the Matter of it is *alieni fori*; for I find my ſelf, and my Brothers that argued for the Action, engaged in a Diſcourſe of the nature of a double Retorn, and the Courſe of Parliament upon it, which as a Judge I cannot ſo well ſpeak to. I had the Honor to be of this Houſe of Commons, and whilſt I was there, I conſidered, as well as I could, the Courſe of Proceedings of the Houſe, and am therefore able to ſpeak ſomething of them, and I am brought into this Diſcourſe neceſſarily by this Action; but I muſt ſay it is an improper Diſcourſe for Judges, for they know not what is the Courſe of Parliament, nor the Priviledge of Parliament: When the Lords in Parliament, whom they are bound to aſſiſt with their Advice, ask the Judges any thing concerning the Courſe or Priviledge of Parliament, they have anſwered that they know them not, nor can adviſe concerning them.

If in Parliament we do not know nor can adviſe concerning theſe things, how can we judge upon them out of Parliament? We ought to know before we judge, and therefore we cannot judge of things we cannot know.

Our being engaged in a Diſcourſe improper for Judges ſhews the Action to be improper, as much as any other Argument that can be made, and this Argument ariſeth from my Brothers that argued for the Action; But now I am in this Diſcourſe, I muſt go on a little further.

My Obſervation of the Courſe of Parliament has been, that they will not permit the Sheriff to delay his Retorn to deliberate, and he cannot take Security of either Party; and if a ſingle Retorn be not juſtified by the Committee of Elections, he is in danger of the Stat. 23 *H.* 6.

It follows, that there is no way for an innocent Sheriff to be ſafe, where he conceives doubt, but in making a double Retorn; and if that ſhould be Actionable too, the Service of the Parliament were the moſt ungratefull Service in the World.

It ſeems rediculous to me, that it ſhould be Objected, that this Courſe of Law is neceſſary to prevent the great Miſchief ariſing from double Retorns, when as it be a Miſchief, or diſliked by the Parliament, either in general or any particular Caſe, they may reject them when they pleaſe, and command the Sheriff to make a ſingle Retorn: So that they may remedy it by their practice, without help of their Legiſlative Power.

Their practice hath been hitherto to receive double Retorns, which therefore in ſome Caſes muſt be Lawfull; and in this very Caſe the double Retorn was accepted, and the Sheriff no way puniſhed for it, which he ought to have been if he had been blameable.

If double Retorns are accepted by the Parliament they are allowed, and we muſt ſay they are Lawfull, which is the ground

ground of my third Reaſon, for which I hold this Action not maintainable.

My Fourth Reaſon is, that there is no legal Damage occaſioned by the Sheriff. The Damages laid in the Declaration are, Firſt, Being kept from Sitting in the Houſe. Secondly, The Pains and Charges he was put unto to get into the Houſe.

Firſt, That of his being kept from Sitting in the Houſe is as much every Man's Damage in the whole County, nay, in the whole Kingdom; and any Man elſe might as well have an Action for it as the Member choſen.

To ſit in Parliament is a Service in the Member, for the benefit of the King and Kingdom, and not for the particular profit of the Member.

It is a Rule in Law, that no particular Man may bring an Action for a Nuſance to the King's High-way; becauſe all Men in *England* might as well have Actions, which would be infinite, and therefore ſuch an Offence is puniſhable only by Indictment, except there be a ſpecial Loſs occaſioned by that Nuſance. For the ſame Reaſon the excluſion of a Member from the Houſe being as much Damage to all Men in *England* as to himſelf, he, nor any Man elſe in *England*, can have an Action for it, but is puniſhable upon the publick Score, and no otherwiſe. For this Reaſon was the Stat. 23 *H.* 6. wiſely conſidered; By that Statute the Action is not given to the Party for his particular Damage, but the Action given is a popular Action, only the Party grieved hath a preference for Six months, but if he do not Sue for that time, every Man elſe is at Liberty to recover the ſame Sum.

The other point of Damage is the Pains and Charges he was put unto, and that is not occaſioned by the Sheriff, but by the deliberation of the Houſe; Why ſhould the Sheriff pay for that? It may be if the Parliament had ſent for the Sheriff the firſt day, and blamed the double Retorn, he would have ventured to determine the matter ſpeedily, and there ſhould have been no cauſe of Complaint for delay:

But

But the Parliament ſaw ſo much Cauſe of doubt, that they think it not fit to put the Sheriff to determine, but reſolve to examine the matter, and give him directions that may guide him in amending his Retorn, thereupon they give day to the Parties on both ſides, and finding the matter of long Examination and Difficult, they deliberate upon it.

It ſeems very unreaſonable the Sheriff ſhould be made pay for this which he did not occaſion, but was a courſe taken by the Parliament for their own Satisfaction, who found no fault in the Sheriff for putting them to all that trouble.

Suppoſe Sir *Samuel Barnardiſton* had been retorned alone, and the Lord *Huntingtowr* had petitioned againſt that Retorn, there had been the ſame Charge to have defended the Retorn: So it was the conteſt of the oppoſite Party that occaſioned the Charge, the deliberation of the Parliament that occaſioned the Delay, but neither of them can be imputed to the Sheriff.

I cannot difference this Caſe from the Caſe of bringing an Action againſt a Jury for malitiouſly and knowingly, and on purpoſe to put the Party to Charges, finding a matter Specially, whereby great Delay and great Expences were before the Party could obtain Judgment, and yet I think no Man will affirm that an Action will lye in that Caſe.

In this Caſe the Damages are found entire, So that if both parts, *ſc.* the not ſitting in the Houſe, and the Pains and Charges, are not Actionable cauſes of Damage, it will be intended the Jury gave for both, and ſo the Judgment is for that Cauſe erronious.

I ſuppoſe the Wages of Parliament will not be mentioned for Damage, for in moſt places they are only Imaginary, being not demanded; but if there were to be any Conſideration of them, it will not alter this Caſe, for upon this Retorn they are due as from the firſt day, and ſo no Damage can be pretended upon that ſcore.

My

My Fifth Reaſon is drawn from the Stat. 23 *H.* 6. which has been ſo often mentioned, that Statute is a great Evidence to me, that no Action lay by the Common Law againſt a Sheriff for a falſe Retorn of a Writ of Election to the Parliament, and this Evidence is much ſtrengthened by the Obſervation that hath been made, that never any Action was brought otherwiſe than upon that Statute.

I muſt admit that if an Action lay by the Common Law, this Statute doth not take it away, for there are no negative Words in the Statute; but it is not likely that the Parliament would have made that Law, if there had been any Remedy for the Party before. The Statute obſerves that ſome Laws had been made before, for preventing falſe Retorns, but there was not convenient Remedy provided for the Party grieved, and therefore gives him an Action for 100 *l.* If the Courts of Juſtice had by the Common Laws Juriſdiction to examine Miſdemeanors concerning the Retorns of Sheriffs to the Parliament, what needed the Parliament to be ſo elaborate to provide Law after Law to give them Power therein, and at laſt to give the Party grieved an Action, can any Man imagaine but that the Parliament took the Law to be that the Party was without Remedy; I know preambles of Acts of Parliament are not always Goſpel, but it becomes us, I am ſure, to have reſpect to them, and not to impute any falſity or failing to them, eſpecially where conſtant uſage ſpeaks for them.

It has been Objected that in theſe times it was reckoned a Damage to be Retorned to ſerve in Parliament, which is the reaſon that no Man then did bring his Action againſt the Sheriff for Retorning another in his ſtead. This cannot be true, for the Statute calls him the Party grieved, and is carefull to provide convenient Remedy for him, and we ſee by the many Statutes about thoſe Times, that it was a miſchief very frequent, and there wanted not occaſion for thoſe Actions which doth extreamly ſtrengthen the Argument of the Non uſer of this pretended Common Law.

An Action upon the Caſe where it may be brought, is a Plaiſter that fits it ſelf for all Times, and for all Sores, and if

ſuch an Action might then have been brought, there was no need for the Parliament to provide a convenient Remedy.

By *Littletons* Rule often mentioned by my Brothers, we may conclude this Action will not lye, for if ſuch an Action had lain it would have been brought before this Time.

In the Caſe of *Buckley* againſt *Rice Thomas*, in *Plowdens* Commentaries 118. which appears to have been elaborately Argued at Bar and Bench; if this Common Law had been thought upon, they might have prevented the Queſtion, Whether the Sheriffs of *Wales* were bound by the Statute of 23 *H.* 6.

It ſeems plain to me that the Makers of the 23 *H.* 6. were ignorant of this Common Law, and yet as my Brother *Thurland* Obſerves, the Judges in thoſe Times uſually aſſiſted in the Pening of the Laws.

The Judges and Councel in the time of *Buckleyes* Caſe were ignorant of this Common Law, elſe it would have been mentioned in the Argument of that Caſe.

This Common Law was never revealed that I find, untill a Time that there were divers other new lights, I mean thoſe Times when *Nevill* brought an Action for a falſe Retorn againſt *Stroud* during the late troubles, but in theſe Times it could never obtain Judgment. I have heard that the Court of Common Pleas ſent the Record to the Parliament, as a Caſe too difficult for the Courts of Common Law to determine.

Pl. v. 2. fol. 168.

This Statute of 23 *H.* 6. is not only Evidence that no ſuch Action lay at the Common Law, but in my Opinion is not conſiſtent with any Remedy at the Common Law, unleſs it be allowed that the Party ſhall be doubly puniſhed.

If the Party grieved has brought his Action upon the Statute and recovered, it was admitted by the Counſel that no Action can be brought at the Common Law, nor, *e contra*, can he recover by the Statute, after he has recovered by the Common Law, becauſe *Nemo bis punitur pro eodem delicto.*

So

So far it ſtands well, but ſuppoſe the Party grieved has let ſlip his Time for Three Months, and then a third Perſon brings a popular Action and recovers 100 *l.* upon the Statute, there is nothing can bar the Party grieved from his Action at the Common Law, for his ſitting ſtill will not conclude him. No Statute of Limittations extending to this Caſe, and if it be ſo, then the Party muſt beſides his Fine and Impriſonment be doubly puniſhed by this Statute, which was made as the Letter of it imports, becauſe there wanted convenient Remedy.

And now I am Diſcourſing of this Statute, I muſt obſerve the great Wiſdom of the courſe of Parliament in theſe Caſes, which hath in great meaſure prevented the bringing of Actions againſt the Sheriffs, even upon this Statute.

Where the Sheriff miſtakes the Perſon in his Retorn, he incurs the Penalty of 23 *H.* 6. though it be without any Malice, and it may happen that where there are 21 Electors of one ſide and 20 of the other, and the Sheriff Retorns him that hath 21, and the Parliament by adjudging an incapacity in two of the 21 may determine that he that had the 20 voices was duly choſen. In ſuch Caſe the Sheriff, has made a falſe Retorn within the Penalty of the Statute 23 *H.* 6. and no Evidence ſhall be given againſt the Determination of the Parliament.

This were a very hard Caſe for the Sheriff, and if he were liable to ſuch Miſchief, many a paſt Sheriff might be awakened, that takes himſelf to be Secure.

But the Courſe of Parliament prevents this, as it is Reaſon; for immediately upon their Determination, they ſend for the Sheriff and cauſe him to amend his Retorn, and thence forward the amended Retorn is the Sheriffs Retorn, and there is no Record that can warrant any Action to be brought for a falſe Retorn. As when the Marſhal of the Kings-Bench, or Warden of the Fleet have made an improvident Retorn, omitting ſome Cauſes wherewith the Priſoner ſtood charged in their Cuſtody, whereby they become liable to Action, they frequently

frequently move the Court to amend the Retorn, and when the Retorn is amended all is ſet Right, for there is no avering againſt a Record. In like manner when the Sheriff hath amended his Retorn he is ſecure from any Action upon that occaſion.

By this means there has of late years been no Recovery upon the Statute, becauſe all Perſons choſe rather to compel the Sheriff to amend his Retorn, that they might be admitted to ſit in the Houſe, then to take their Remedy upon the Statute, and no Man can recover upon the Statute firſt and afterwards have the Retorn amended, for I have been told that by the courſe of Parliament, unleſs the Petition be lodged ſome few Days after the Retorn, it cannot be received afterwards, ſo that a Man cannot upon that Statute have Remedy at Law, and alſo in Parliament which ſeems to be wiſely provided to prevent any contrariety of Determinations.

This Statute of 23 *H.* 6. furniſhed thoſe that argued for this occaſion with one Argument which doth now vaniſh, they ſaid that all the inconveniencies that could be Objected to this Action were the ſame upon the Statute, 23 *H.* 6. *ſc.* that upon that Statute the right of Election muſt be examined upon a Tryal where there might be contrariety of Determinations, for it appears by what I have ſaid that there can be no contrariety of Determinations.

And there are other Inconveniences in this Remedy by the Common Law, which are not in the Remedy given by the Statute; for by the Statute the Sum to be recovered is limitted, the Informer has a time prefixed, So that there are bounds ſet which cannot be exceeded: But the Remedy by the Common Law is without limittation of time, which is conſiderable; for all Sheriffs that ever made any Retorn otherwiſe then the Parliament determined, will be liable during their whole lives to them that will call them to Account for it; I ſay, this Caſe is without limittation of Time, without meaſure of Damages, or any Rules contained in a written Law; it depends upon a general Notion of Remedy, which may be enlarged by conſtructions, as it is now introduced without Preſident.

To

To finish my Observations upon this Statute, I say, it is great Wisdom in the Parliament, to call the Sheriff to amend the Return, and so prevent any Remedy against him upon the Statute of 23 *H.* 6. For I do not see that the Rules of Law concerning Elections, are so manifestly clear and known, that it is fit that the Sheriff should, upon all Returns that are corrected by the Parliament, pay the reckoning of the contest.

I have a Sixth Reason against this Action, which is, because the Sheriff is not admitted to take security to save him harmless in such Cases; I take this reason to be *instar omnium*, and there needs no other in the Case.

It were the most unreasonable and grievous thing in the World, that the Sheriff should be bound to act without any deliberation, and not be allowed to take any security, and yet be liable to an Action; which way soever he take there is no course can avoid it, but this of a double Return, as I have before shewn.

It has not been said by any that argued the other way, that the Sheriff may take security, and I suppose will not be said, for that will be a dangerous course for Parliaments; for then the most litigious man must be returned, and not he which is truly chosen.

If the Sheriff may not take security, the Law must be his security. It was an Argument used by my Brother ——, that because the Law imposes an Officer, *viz.* the Sheriff, therefore the Law must give the party an Action against that Officer, if he misdemean himself: the Argument does not hold universally, for the Law imposes a Judge, and yet no Action lies against him: but the reason of that Argument, if turn'd the other way, is irrefragable; as thus, the Law will not suffer the Sheriff to take security, therefore the Law must be his security, else it were a most unreasonable Law. This reason of it self is sufficient to bear the whole Case; for no Case can be put in our Law, nay, no Case can be in any reasonable Law, where a man is compellable to judge without deliberation, and cannot take security, and yet shall be liable to an Action.

I have two reasons to add, upon which I lay great weight, though they depend not upon any particular circum-

ſtances of this Caſe, but the general conſideration of it; they are theſe,

1. This is a New Invention.
2. That it relates to the Parliament.

As it is a new Invention, it ought to be examined very ſtrictly, and have no allowance of favour, and then it will have the ſame fortune that many other Novelties heretofore attempted in our Law have had.

Actions upon the Caſe have ſometimes been received in new Caſes, where it ſtands with the Rules of Law, and no inconveniency appears, but they have been more often rejected. I ſhall inſtance ſome Caſes that have been rejected, becauſe it will be manifeſt by them, that all the Arguments and Poſitions laid down by my Brothers, that would ſupport the Action, are as well applicable to ſeveral Caſes, that have been already rejected, as to the Caſe at Bar.

An Action upon the Caſe was brought againſt a Grand Jury-man, for falſly and maliciouſly conſpiring to Indict another, and adjudged it would not lie. An Action was brought againſt a Witneſs, for teſtifying falſly and maliciouſly, but adjudged that no Action would lie in thoſe Caſes.

Theſe three Inſtances are applicable to every Argument urged for this Action, the Arguments my Brothers made in depreſſing Falſity and Malice, thoſe which they made from the compariſon of other Actions upon the Caſe, *a minore ad majus*, the Argument, that becauſe the Law impoſes the Officer, it will puniſh Malice; theſe Arguments have the ſame force in the caſe of a Judge, Juror, or Witneſs, and yet my Brothers admit in thoſe Caſes an Action will not lie, which ſhews the invalidity of thoſe Arguments.

Now I ſhall give other Inſtances, where Actions upon the Caſe have been rejected for Novelty and Reaſons of Inconveniency.

An Action of the Caſe was brought againſt the Lord of a Mannor, for not admitting a Copyholder, and it was adjudged it would not lie, *Cro. Jac.* 368.

There

There was Verdict given, and Damages found, by the Jury in that Case, the Lord is compellable in *Chancery* to admit a Copyholder; and what harm would it have been, if there might have been remedy given by the *Common Law*, there being a Custom broken, by which the Lord was bound? The Reasons of the Book are, because it was a Novelty, and it would be vexatious, if every Copyholder should have an Action against the Lord, when he refused to admit him upon his own terms.

It hath been adjudged, that an Action upon the Case will not lie for the breach of a Trust, because the *Common Law* cannot try what a Trust is; but if such Actions were allowed, the Law might declare that to be a Trust which the *Court of Chancery*, that properly judges of Trusts, might say is none; and where the *Common Law* cannot examine the principal Matter, the Damages that are but dependant upon it shall not be regarded.

Anthony Maddison brought an Action against *Skipwith*, for maliciously killing Sir *Thomas Wortley*. The Case was thus: The Plaintiff was a young *Lawyer*, that had expended all his Gains in the Purchase of a Rent, that was determinable upon the death of Sir *Thomas Wortley*; *Skipwith* quarrelled with Sir *Thomas* in the Streets, about a Mistris, and killed him, whereby *Maddison* lost his Rent. It was held the Action would not lie, though it were laid to be done maliciously, and on purpose to determine the Paintiff's Rent.

I observed in that Case, that although Mr. *Maddison* knew very well there was a Mistris in the case, and that his Rent was not aimed at, yet he would fain try his fortune in the Suit, thinking that perhaps a Jury, out of compassion to him, or to discourage the like Facts, might make the Manslayer pay him for his loss. But the Judges would not suffer it to go on, it being a meer device and new-fangled Action.

It hath been held, that an Action will not lie against a person for suing for Tithes in kind, knowing that there was a *Modus*, because it might then be perilous for any person to insist upon his right.

It was held by the *Court of Common-Pleas*, that no Action will lie for suing an *Attorney* knowingly in another Court against

againſt his Priviledge, for his means to enjoy his Priviledge, is by Writ of Priviledge, and he is not bound to claim his Priviledge, nor can his adverſary know he will claim it.

An *Action* was lately brought in the *Kings-Bench*, (as I heard) for delaying a Poſt-Letter maliciouſly, whereby the Plaintiff wanted Intelligence, that might have been of great advantage to him. The Court diſcountenanced the *Action*, ſo that it proceeded no further. It was then ſaid (as I heard) to this effect: That if ſuch Precedents were admitted, there could hardly be any dealing or correſpondence, but might be matter for *Actions at Law*; and although the Caſe depended upon proof of particular malice, and the Defendant will be acquitted, if his caſe be not odious, yet we muſt conſider, that there is both charge and vexation of mind that attends the defence of a juſt Cauſe, and we muſt not ſubject men for all their actions to ſuch trouble and hazard.

Theſe Inſtances ſhew, that although an *Action upon the Caſe* be eſteemed a *Catholicon*, yet when *Actions* have been applied to new Caſes, they have been always ſtrictly examined, and upon conſiderations of Juſtice or conveniency they have been many times rejected.

For though the Law advances Remedies, as my Brothers obſerved, yet it is with conſideration, that Vexation be not more advanced than Remedy.

It is my opinion, that no new Device ever was or can be introduced into the Law, but abſurdities and difficulties ariſe upon it, which were not foreſeen, which makes me very jealous of admitting Novelties.

But in matters relating to the Parliament, which is my ſecond ground, there is no need of introducing Novelties, for the Parliament can provide new Laws, to anſwer any Miſchiefs that ariſe, and it ought to be left to them to do it.

Eſpecially in a Caſe of this nature, concerning Elections, which the Parliament have already taken care of, and preſcribed Remedies by the ſeveral Statutes that have been made concerning them, I ſay, in ſuch a Caſe there is little need to ſtrain the Law.

The

The Judges in all times have been very tender of medling with matters relating to the Parliament. I do not find, that ever they tried Elections, but where Statutes give them expreſs power, or that they ever examined the behaviour of a Sheriff, or any Officer of the Parliament, in relation to any ſervice performed to the Parliament, but upon the Statutes, and in *Brouncker's* Caſe, *Dyer* 168. The Statute was their Rule in the *Star-Chamber*, and they inflicted the ſame Puniſhment that is appointed by the Statute.

If we ſhall allow general Remedies (as an *Action upon the Caſe* is) to be applied to Caſes relating to the Parliament, we ſhall at laſt invade Priviledge of Parliament, and that great Priviledge of Judging of their own Priviledges.

Suppoſe an *Action* ſhould be brought in time of Prorogation, againſt a Member of Parliament, for that he falſly and maliciouſly did exhibit a Complaint of Breach of Priviledge to the Parliament, whereby the party was ſent for in cuſtody, and loſt his liberty, and was put to great charges to acquit himſelf, and was acquitted by Parliament.

If upon ſuch a Caſe the Jury ſhould find the Defendant guilty, why ſhould not that *Action* be maintained as well as this at Bar? It may be ſaid for that *Action*, that the Judgment of the Parliament is followed, and the Priviledge is not tried at Law, but determined firſt in the Houſe. 2. It may be ſaid, that the party hath no other way to recover his Charges.

It would be dangerous to admit ſuch an *Action*, for then there would be peril in claiming Priviledge, if the party complained of, had the fortune to be acquitted by the Houſe; the Member that made the complaint, will be at the mercy of the Jury, as to the point of Malice, and quantity of Damages. Such a Precedent, I ſuppoſe, would not pleaſe the Parliament, and yet it may with more juſtice be the ſecond Caſe, than this Caſe at Bar the firſt.

Actions may be brought for giving Parliament-Protections wrongfully. *Actions* may be brought againſt the Clark of the Parliament, Serjeant at Arms, and Speaker, for ought I know, for executing their Offices amiſs, with Avermens of Malice and Damage, and then muſt Judges and Juries

determine what they ought to do by their Offices, and in effect give Rules to them.

It cannot be seen whither we shall be drawn, if we meddle with Matters of Parliament in Actions at Law, therefore, in my judgment, the only safety is in those bounds that are warranted by Acts of Parliament or constant Practice.

Suppose this *Action* had been brought before the Election decided in the House, and the Jury had found one way, and the Parliament had determined contrary, how inconsistent has this been?

But it was said in the *Kings-Bench*, that the Court would not try it before the Parliament had determined the Election, and then that cannot be contested, but the Judgment of the Parliament must be followed; and my Brother —— but now said, Sure no Man will be so indiscreet, as to bring such an *Action* before the Parliament have determined it, and the Court will not try it, before such time as the Election be decided in a proper way.

In my opinion this was not rightly consider'd, for how can the Court stay any Suit, to expect the Determination of the Parliament? And what reason or justice is there, that the Sheriff, who is no party called to answer in the Parliament, should be concluded in any thing, by a Judgment between other parties, to defend himself from a demand of Damages, in a Course of Law, where Witnesses are examined upon Oath, which they cannot be in the Commons House? There is no reason the Suit at Law should stay till the House have determined, if the determination of the House be not conclusive in that Suit.

And for the discretion of the persons that are like to bring such *Actions*, I cannot depend upon it, for I see in this Age, some Men will insist upon their Private Rights, to the hindrance of Publick Affairs, of higher consequence than any that can come before the Courts in *Westminster-hall*.

It may be there will not want men that will press us to judge in such cases, not only before the Parliament have determined, but against what the Parliament have determined, and will tell us, that the Sheriff was no party, that Witnesses were not there examined upon Oath, and

pro-

produce Arguments from Antiquity, which we ſhall be very loth to judge of.

I can ſee no other way to avoid conſequences derogatory to the Honour of Parliament, but to reject the *Action*, and all others that ſhall relate either to the Proceedings or Priviledge of Parliament, as our Predeceſſors have done.

For if we ſhall admit general Remedies, in Matters relating to the Parliament, we muſt ſet bounds how far they ſhall go, which is a dangerous province; for if we err, Priviledge of Parliament will be invaded, which we ought not any way to endamage. This I ſpeak for general Remedies: Now I will conſider this particular Caſe, which, in my opinion, would bring danger and diſhonour to the Parliament.

It is diſhonourable to the Parliament, that there ſhould be no protection in their Service; I have ſhewn, that the Sheriff can be ſafe in no caſe, if he ſhall be ſued in ſuch a caſe as this; and can there be a greater reproach, than that there is no ſafety in their Service? no body can ſerve them cheerfully or willingly, at that rate.

It has been objected, that the Sheriff is not their Officer, but is the Officer of *the Court of Chancery*, which ſends forth the Writs, and receives the Returns. The Argument is plauſible, but will not paſs in the Parliament, for there they ſay the *Court of Chancery* is the Repoſitory of their Writs, and will not allow them to iſſue without Warrant from the Houſe, they will not ſuffer the *Court of Chancery* to meddle with the Returns, or the Sheriff; the Parliament ſends immediate Orders to the Sheriff, if the Return be too ſlow; they direct the Sheriff to amend his Return; they puniſh the Sheriff, where they find him faulty: ſo that it appears they exerciſe an immediate Juriſdiction over the Sheriff, and I ſuppoſe they would judge it very falſe Doctrine to ſay, that the *Court of Chancery* can any way meddle with the Returns, or the Officer.

Admitting the Sheriff to act in Returns, as the Officer of the Parliament, it concerns them, that he ſhould be liable to no other puniſhment, but what they inflict; otherwiſe they cannot expect to be obeyed.

To

To have others Judge when their Servants do well, will be to have others give Rules to their Servants and Service, which they will think inconvenient.

Let it be considered, how hard a Task Sheriffs have in Elections of Knights to the Parliament; the Appearance is commonly very numerous; the Parties contesting very violent; the Proceedings tumultuous; the Polling is sometimes in several Places at once: so that the Sheriff can hardly be a Witness of the action; and if a dispute be in the House of Commons, he is no party to it. If after all this, the Sheriff, who cannot indempnifie himself by security, shall be liable to an *Action*, the Service of the Parliament may be reckoned a miserable slavery, which is not for their honour.

As this is dishonourable, so it is dangerous to Parliaments. It concerns the Kingdom, that Returns to Parliament should be upright and impartial; that they may be so, the Sheriffs should be secure from all fears.

Judges are not liable to *Actions*, that they may proceed uprightly and impartially; if they were subject to Suits for their judgments, there is that earnestness and confidence on both sides, that one side would be dissatisfied and trouble them, and they could not discharge their duty without apprehensions of disquiet.

If the Sheriffs be exposed to *Actions* thus, let us consider what and whom he is to fear; he may fear the Suit of the Party, and he may fear the Suit of the King, and it follows necessarily, that if an *Action* lies, an *Information* for the King will also lie, for the misdemeanour in his Office. If it be not a Case priviledged by the Complexion of it as Parliamentary, from being examined in *Westminster-hall*, but that he may be punished at the Suit of the Party, he may certainly be as well punished at the King's Suit; if so, where is the Sheriff's security? will his own innocency secure him? that must be tried by a Jury of the Country where the Parliament sits, who are (it may be) strangers to him as well as to the matter, or by a Jury of the Country where the Election was, where (it may be) they will be of an opposite party, the Plaintiff may wait his opportunity, and question him twenty Years after; if he

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be condemned, his punishment is unlimited; a Fine may be set to any height for the King; the Damages may be given to any value for the party: where is his security upon such proceedings, will he not be more afraid of such punishment out of Parliament, than of any punishment in Parliament? will not, or may not his terror make them desire to please them that can punish them out of Parliament, rather than do right? will not that be dangerous to the Constitution of Parliaments.

As the punishment out of the Parliament may be a terror to those which mean well, so colourable punishments may be as mischievous on the other side, for they may prevent any punishment in Parliament; for, *Nemo bis punitur pro eodem delicto*, they may serve for protection of men that do ill: when it is seriously weighed of what Consequence this may be, the Case at Bar will not be thought a Case fit to be received by the Judges, without the countenance of a new Law.

They object, here is Malice found by the Verdict, and there can be no danger or inconveniency that Malice should be punished.

This Objection fortifies my Opinion, for Malice, upon which they would have the Scales turn'd, in this Case is not a thing demonstrative, but interpretative, and lies in opinion; so that it may give a handle to any man to punish another by.

The instance of this very Case shews, that a good man may reasonably be afraid of the event of his defence in such a Case.

For although the matter was of great examination in Parliament, and at last decided but by few Voices, and no observation of the Sheriffs miscarriage there, though it appeared upon the Tryal, (which I may say, being present) that the Sheriff was guided by the advice of his Friends of Councel and of Parliament-men, that told him, the only safe course was, to make a double Return, yet the Jury condemned him to pay 800 *l.* against the expectation of the Court, for the Judges, that were present at the Tryal, did all declare publickly, that they would not have given that Verdict.

The Judges heard all the Evidence the Jury could go upon, for being of a remote County to the place of Election, the Jury could know nothing of their own knowledge, and yet the Judges concurred not with the Jury in opinion.

I know we are not to examine the truth of the Verdict, we muſt take it for Goſpel, neither does any partiality in this particular lead me in judgment, but I ſhew it as an inſtance, that Malice is not demonſtrative; mens minds may be miſtaken: and innocent men have therefore reaſon to be afraid, eſpecially in ill times, and may uſe ſuch means for their ſafety, as may not be convenient for Parliaments.

But there can be no danger or inconveniency in the Cenſure of the Parliament, that repreſents the whole Kingdom, who hitherto have alone exerciſed this Power, and who may at any time reform the Law, if the preſent practice be any way inconvenient.

Upon the Reaſons which I have produced, I ground my Opinion. Now it will be neceſſary to weigh what has been ſaid in oppoſition to it.

The Arguments urged on the other part, related either to the Ingredients or Circumſtances of the Action, or to the Foundation and Subſtance of it.

I call the Ingredients and Circumſtances of the Action, that it is laid with the words, *falſo malitioſe deceptive & ſcienter*, and that here is a Verdict in this Caſe, and Damages are found.

The words, *falſo malitioſe & deceptive*, will ſometimes make a thing actionable, which is not ſo in it ſelf, without Malice proved, though there be the ſame damage to the party.

As where a man cauſeth another to be falſly indicted, yet if it be not maliciouſly, no Action lies, though there be the ſame trouble, charge and damage, in one Caſe, as in the other.

But it is only where a man is a voluntary Agent, for if a man be compellable to act, you cannot moleſt him upon any Averment of Malice, as if a Grand Jury-man cauſeth another to be indicted; though you aver Malice, you cannot

not have an Action againſt him: ſo for a Witneſs that doth teſtifie, or a Judge that judgeth.

In the Caſe at Bar, the Sheriff is compellable to act, and not barely, as a Miniſter, to ſend the Indenture, but, as a Judge, to ſay which is the major part of the due Electors, and if he miſtakes, there is no reaſon it ſhould ſubject him to an Action upon an artificial Averment of Malice.

I remember, in *Shepheard* and *Wakeman's* Caſe, in the *Kings-Bench*, Mr. Juſtice *Wyndham* ſaid well, that the words, *falſo & malitioſe*, were grown words of courſe, and put into every Action, and that, to his knowledge, Juries had many times not regarded them, that he looked upon them as words of form.

If we ſhould make the words, *falſo & malitioſe*, ſupport an Action, without a fit Subject-matter, all the actions of Mankind would be liable to Suit and Vexation; they that have the Cooking (as we call it) of Declarations in Actions of the Caſe, if they be skilful in their Art, will be ſure to put in the words, *falſo & malitioſe*, let the Caſe be what it will, they are like Pepper and Vinegar in a Cook's hand, that help to make Sauce for any Meat, but will not make a Diſh of themſelves.

Falſo & malitioſe will not enable an Action againſt a Judge, nor againſt a Indictor, or Witneſs, nor where words are not actionable, though the Plaintiff have a Verdict and Damages found, nor for a breach of a Truſt, which is *alieni fori*.

The reaſon of every one of theſe Caſes holds in the Caſe at Bar, and therefore it ought to have the ſame Reſolution.

As to the word *ſcienter*, it hath weight ſometimes, as if an Action be brought for keeping a Dog that worried another's Sheep, *Sciens Canem ad mordendum oves eſſe conſuetum*; or for detaining the Servant or Wife of another, *ſcienter*. In theſe Caſes, if the Defendant have been told, that the Dog did worry Sheep, or that it was the Servant or Wife of another, though it may be he did not believe it, yet it was *ſcienter*, for the word implies no more, than having notice. And in thoſe Actions he muſt inform himſelf at his peril, and may, if he doubts,

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avoid danger, by putting away those things which give offence.

But in this Case he could receive Information by none, and is not to believe or disbelieve any body, but is bound to judge of the thing himself, and to act according to his judgment. So that no proof could be made of the *scienter*, for one side tells him the Election is one way, the other side tells him it is the other way, but he being present to the whole Action, must follow the dictates of his own judgment. Hence it appears, *scienter* in this Case is an empty word, not referring to Notice of a Fact, but to Matter of Judgment, which cannot any way be proved.

It has been often urged, that this Case is stronger being after a Verdict, and Damages found by the Jury, and it has been said that perhaps upon a Demurrer, it might have been more doubtful.

The Case is the same to me upon a Verdict, that it would have been upon a general Demurrer, and no stronger, for a Demurrer is the Confession of the Party, of all that can be proved, or can possibly be found upon that Declaration.

It is my Lord *Cooke*'s advice, in *Cromwell*'s Case, 4 *Part* f. 4. never to Demur to a Declaration, if there be any hopes of the Matter of Fact, for the Matter in Law will as well serve after Verdict, as upon Demurrer.

It had been a very odious Case, if the Sheriff should have admitted all this Fact to be true by a Demurrer.

The finding the Plaintiffs Damages adds no strength to the Case, for we see every day upon Actions for Words, though the Jury find the Defendant guilty of speaking words *falso & malitiose*, and find it to be to the Plaintiffs great damages, yet if the words are not such as will bear an Action, the Court stays Judgment, and if Judgment happen to be given, it is reversable for Error, which shews, that the finding of Damages by the Jury, cannot make an Action better, than if it were to be adjudged upon Demurrer.

I shall now consider what has been said to maintain this Action upon the main substance and foundation of it. They say, this is a Case within the general reason of the Com-

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mon Law, for here is Malice, Falsity, and Damage, and where they concur, there ought to be remedy, and although this be a new Case, yet it ought not to be rejected, for other kind of Actions have been newly introduced, and this is as fit to be entertained as any.

My Brothers, that argued even now for the Action, shewed great Learning and great Pains, and certainly have said all that can be invented in suppore of this Case, but as far as I could perceive, they have spoken only upon general Notions to that purpose I just now mentioned, but nothing that I could observe applicable to the reason and difference I go upon.

As for the Rule they go upon, that where Malice, Falsity and Damage do concur, there must be remedy; I confess it is true generally, but not universally, for it holds not in the Case of a Judge, nor an Indictor, nor a Witness, nor of words that import not legal slanders, though they are found to bring damage, as I have shewn before; and the reasons that exempt these Cases from the general Rule, have the same force in the Case at Bar.

I must confess, the Judges have sometimes entertained new kinds of Actions, but it was upon great deliberation and with discretion, where a general inconvenience required it.

If *Slade*'s Case were new, (for my Brother *Eyre* observes truly, it was said in that Case, that there were infinite number of Precedents) that Case imported the common course of Justice; Actions for words, that are said to be new, though they have been used some hundreds of Years, are a necessary means to preserve the Peace of the Kingdom. The Case of *Smith* and *Crawshaw*, Cro. Car. 15. was a Case of general concern, being, that Prosecutions for Treason may be against any man, and at any time.

But in the case at Bar, neither the Peace of the Kingdom, nor the Course of Justice is concerned in general, but only the Administration of Officers of the Parliament in the Execution of Parliamentary Writs, and can never happen but in time of Parliament, and must of necessity fall

under notice of the Parliament; so that if the Law were deficient, it is presumed the Parliament would take care to supply it; discretion requires us rather to attend that, than to introduce new Precedents upon such general Notions that cannot govern the course of Parliaments.

My Brother ---- said the Common Law complied with the *Genius* of the Nation. I do not understand the Argument; Does the Common Law Arc we to judge of the changes of the *Genius* of the Nation? whether may general Notions carry us at that rate? for my part, I think, though the Common Law be not written, yet it is certain, and not arbitrary; we are sworn to observe the Laws as they are, and I see not how we change them by our Judgments, and as for the Genius of the Nation, it will be best considered by the Parliament who have Power of the Laws.

In the Case at Bar, I look upon the Sheriff as a particular Officer of the Parliaments, for the managing Elections, and if he were not Sheriff, I look upon the Writ as if it were an Order of Parliament, and had not the Name of a Writ: I look upon the Course of Parliament, which we pretend not to know, to be incident to the Consideration of it; so that it stands not upon the general Notion of Remedy in the common course of Justice.

The Arguments of the Falling of the Value of Money, whereby the Penalty of 100 *l.* provided by the 23 *H.* 6. is become inconsiderable, and the encrease of the estimation of being a Member of Parliament, if they were true, are Arguments to the Parliament to change the Law by encreasing the Penalty, but we cannot do it.

My Brother----, in his Argument at the Bar, would embolden us, telling us we are not to think the Case too hard for us, because of the Name or Course of Parliament, for Judges have punished Absentees; they may determine what is a Parliament; what is an Act of Parliament; how long an Ordinance of Parliament shall continue, and may punish Trespasses done in the very Parliament.

I will not dispute the truth of what hath been said in this, but if his Arguments were artificial, he might have spared them,

them, for they have no manner of effect, to draw me beyond my ſphear.

I will not be afraid to determine any thing that I think proper for me to judge, but ſeeing I cannot find the Courts of Juſtice have at any time medled with Caſes of this nature, but upon power expreſly given them by Acts of Parliament, I cannot conſent to this Precedent, I am confident when there is need the Parliament will diſcern it, and make Laws to enlarge our Power, ſo far as they ſhall think convenient.

I ſee no harm, that Sheriffs in the mean time ſhould be ſafe from this new deviſed Action, which they call the Common Law, if they miſdemean themſelves they are anſwerable to the Parliament, whoſe Officers they be, or may be puniſhed by the Statutes made for the regulating Elections.

It is time for me to conclude, which I ſhall do by repeating the Opinion I at firſt delivered, *viz.* That this Judgment is not warranted by the Rules of Law, that it introduceth Novelty of dangerous conſequence, and therefore ought to be reverſed.

Sæpe Viatorem nova non vetus orbita fallit.

F I N I S.